

# The self-employment justice gap

The case for online dispute resolution

Jason Brock | June 2020



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## ABOUT THE PROJECT

This is the second of two Fabian Society/Changing Work Centre research reports on improving employment conditions for low-paid self-employed workers.

This report was based on desk research and one-to-one interviews with a number of self-employed workers and legal specialists.

The research was funded by grants from Trust for London and the Dartmouth Street Trust. Trust for London is an independent charitable foundation which aims to tackle poverty and inequality in London by funding voluntary and charity groups, independent research; and providing knowledge and expertise on London's social issues.

The Changing Work Centre is a joint initiative by the Fabian Society and Community union and Community's funding for the centre also made this project possible.

The Changing Work Centre was established by the Fabian Society and Community union in February 2016 to explore progressive ideas for the modern world of work. Through in-house and commissioned research and events, the centre is looking at the changing world of work, attitudes towards it and how the left should respond. The centre is chaired by Yvette Cooper MP and supported by an advisory panel of experts and politicians.



## ABOUT THE AUTHOR

Jason Brock is a former senior researcher at the Fabian Society and is currently Labour leader of Reading Borough Council.

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## SUMMARY

This report makes the case for an online dispute resolution (ODR) service for self-employed workers and explores the role such a service could provide. It shows that self-employed workers face challenges distinct from employees and argues for new systems and processes to address the consequent justice gap.

The growth of new forms of self-employment and the platform economy means there is a particular and pressing need to tackle the problem of incorrect employment status, often labelled as 'bogus self-employment'. But a new service should also resolve problems for genuinely self-employed workers, to enable them to make full use of their rights, establish their tax status and claim late payments.

The report draws on examples of legal technology from the Netherlands, Canada and the United States that seek to promote and widen access to justice. These innovations demonstrate 'proof of concept' and should be used as a basis for developing a UK online dispute resolution (ODR) service that can be used to address employment and workplace issues for the low-paid self-employed.

## CLOSING THE JUSTICE GAP FOR THE SELF-EMPLOYED

Chapter 1 outlines the case for new online systems to help resolve disputes for self-employed workers. It sets out five key issues limiting access to justice for the low-paid self-employed:

- **Difficulty accessing courts and tribunals:** People seeking to challenge their self-employed status and (genuinely) self-employed workers seeking to uphold their rights have to go to a court or employment tribunal and argue their case. It is neither effective nor equitable to require an individual to have to make use of time-consuming legal remedies when more straightforward processes are achievable.
- **Legal aid cuts:** Legal aid is no longer available in employment tribunal cases (except those involving alleged discrimination) which makes it much harder for the low-paid self-employed to access justice. Wider reductions in legal aid funding have also led to a steep decline in the availability of legal advice in

general and there are now advice 'deserts' across the UK where people cannot access experts to explore whether they may have a case.

- **Making small claims:** Self-employed workers chasing late payment from an engager need to apply to the courts when they have exhausted informal processes (this is usually through the online 'money claim' service). The lack of a simple dispute resolution service exacerbates what is already an unequal power relationship with the contracting party, where workers are often dependent upon their good will for future work. Many low-paid self-employed workers will conclude that the small claims court is not a practical or viable option.
- **Unclear/non-existent contracts:** Many low-paid self-employed workers do not receive written contracts from their clients and consequently can find their terms of engagement are unclear and difficult to enforce. The use of verbal agreements also frequently makes redress untenable if it relies on proving mutual agreement.
- **Lack of workplace processes and protections:** With traditional employment, workers are often able to use internal company mechanisms (eg HR policies and departments) or receive support from a trade union to resolve problems at work. People with 'self-employed' status do not have employment law protections beyond minimal anti-discrimination and health and safety regulation, but they also usually lack institutional machinery to support them. Although trade unions are taking active steps to expand their support, self-employed workers will never be able to access the same workplace protections and processes available to employees.

## KEY ISSUES FACING SELF-EMPLOYED WORKERS

Chapter 2 discusses the key legal issues that need to be taken into account for an ODR system to be an effective mode of redress for low-paid self-employed workers:

- **Employment status:** disputes may arise about whether an individual is 'self-employed', a 'worker' or an 'employee' for legal purposes. A preliminary assessment could be automated,

using criteria previously established in the courts.

- **Tax status:** this is a separate issue to employment status and requires different modes of resolution. HMRC off-payroll working rules (known as 'IR35') are discussed because low-paid self-employed workers are less likely to have access to the complex accountancy and tax skills needed to handle this area.
- **Late payments:** ODR can offer an excellent way of tackling late payments by providing self-employed workers with a route to redress without having to rely on the confrontation of a money claim.

Low-paid self-employed workers also have concerns that may not warrant an official ODR process but could still be addressed by technological innovation. Two options for resolution are identified: using technology to create digital grievance systems; and the opportunity of 'WorkerTech' to promote peer-to-peer support.

## DESIGN REQUIREMENTS

Chapter 3 outlines the key design requirements for an ODR system for self-employed workers and considers the services it should be able to provide. The key stages proposed are:



To succeed, the system must be readily navigable without the support of a lawyer. Early stages should be largely automated and all stages should be exclusively or mainly online. This is the only way to both widen access and reduce costs.

Participation would need to be compulsory for responding parties because of the power imbalances between contractor and engager. This would require legislation.

The costs of developing the ODR system could be met through the existing government funding for developing new technologies in the courts service.



## CHAPTER 1. CLOSING THE JUSTICE GAP FOR THE SELF-EMPLOYED

This report examines the challenges faced by low-paid self-employed workers in attaining recourse in the world of work. These workers face barriers distinct from employees and need new systems and processes to address the consequent justice gap. Our proposed solution is an integrated online dispute resolution service for self-employed workers.

The growth of new forms of self-employment and the platform economy means there is a particular need to tackle the problem of incorrect employment status, often labelled as 'bogus self-employment'. But low-paid self-employed workers also face other barriers to accessing their legal rights. Some of the problems they face stem from legal complexity. In UK employment law there are three types of employment status: self-employed, worker and employee (the appendix summarises the differences between them in terms of definitions and associated rights).

Securing access to justice for self-employed workers matters because they now make up such a large part of the economy. In 2019, 15 per cent of workers across the UK – and 18.5 per cent of workers in London – were self-employed.<sup>1</sup> A high proportion are economically vulnerable, since self-employed workers have lower average earnings and are much less likely to have pension savings than employees.<sup>2</sup>

### CHALLENGES FOR THE SELF-EMPLOYED AND THE FAILURE OF CURRENT SYSTEMS

At present, the self-employed only have limited access to redress for workplace issues. There are five specific challenges – in addition to a general problem of ignorance of rights and responsibilities relating to self-employment.

#### 1. Difficulty accessing courts and tribunals

People seeking to challenge their employment status have to go to court or an employment tribunal and argue their case. Similarly, people who are (genuinely) self-employed or in the intermediate 'worker' category need to use the tribunals or courts to uphold their workplace rights. Even though the courts have ruled that employment tribunal fees are unlawful, for many low-paid self-employed workers the use of a tribunal is a tremendous challenge,

In 2019

**15%**

of workers across the UK – and 18.5 per cent of workers in London – were self-employed

requiring considerable investment of time and the likely expense of hiring representation, unless the worker is backed by a trade union. The UK's three-tier system of employment law generates plenty of disputes regarding correct employment status, especially regarding whether someone is formally 'self-employed' or a 'worker'. It is neither effective nor equitable to require an individual to have to make use of time-consuming legal remedies when more straightforward processes are achievable.

## 2. Legal aid cuts

Legal aid is no longer available in employment tribunal cases (except those involving alleged discrimination), making it much harder for the low-paid self-employed to access restitution. Moreover, the reduction in legal aid funding has had a negative impact in terms of the provision of advice and support in general and legal advice 'deserts' now exist across the UK.<sup>3</sup> In 2017 the Fabian Society published *The Right to Justice*, the final report of the Bach Commission, which analysed gaps in civil legal aid and proposed policy solutions which have not been implemented.<sup>4</sup>

## 3. Making small claims

Self-employed workers chasing late payment from an engager must make use of the courts (usually via the online 'money claim' service) when they have exhausted informal processes. Self-employed workers' experience a sizeable power imbalance in their relationship with the contracting party and may well be dependent upon their good will for future work. This means a court claim is often not a practical avenue open to a low-paid self-employed worker. The Small Business Commissioner's own advice on chasing payments implicitly acknowledges this by listing the option of a money claim at the very end of a long list of other suggestions.<sup>5</sup>

## 4. Unclear or non-existent contracts

Many low-paid self-employed workers do not receive clear written contracts from their engager/client and consequently can find that their terms of engagement are unclear and difficult to enforce. The common use of verbal agreements also often makes implementation of non-statutory forms of redress untenable, relying as they do on proven mutual agreement.

## 5. Lack of workplace processes and protections

In traditional employment, workers would be able to access internal company mechanisms (eg HR policies and departments) or receive support from a trade union in resolving workplace issues. Those whose employment status is formally 'self-employed' do not have employment law protections beyond minimal anti-discrimination and health and safety regulation. But they also lack the institutional machinery to support them as they are not usually covered by HR policies and practices applying to employees. The help of trade unions may be an option. For example, freelancers in the creative industries are often union members, while the trade union Community offers self-employed workers in any sector advice on legal rights and support in recovering late payments. Unions have been making concerted efforts to increase their membership and service offering among self-employed workers. But firms engaging self-employed contractors can frequently disregard unions and at present only 7 per cent of self-employed workers are trade union members. Union membership is important but alone it can never replicate the full range of workplace protections and processes available to employees.

Only

7%

of self-employed  
workers are trade  
union members

### TAKING JUSTICE ONLINE

Given that a justice gap exists between employees and self-employed workers, it is necessary to explore ways of closing this.

One efficient and effective way to address the self-employment justice gap would be to introduce new online systems to help resolve workplace disputes. This could allow much faster recourse for the low-paid self-employed than is currently available while also limiting the expense. For businesses, the speed and simplicity of such an approach would also be beneficial as it should help prevent more protracted disputes with higher legal expenses. This would have a benefit for government too, since it is likely to prove cheaper than reliance on existing face-to-face systems. In short, an online service has the potential to produce both expedient and equitable outcomes.

The UK does not have a good record of embracing technology in legal services. Even simple systems, such as online chat facilities from information and advice providers, have been slow to emerge. The abolition of legal aid for employment cases (except those involving discrimination) has made the demand for free personalised advice more pressing.

At present, the most common form of online legal provision is information, which is provided by charities such as Citizens Advice and statutory agencies like ACAS. Some of these services offer 'signposting': Advicenow, for example, seeks to collate resources from across other organisations to provide a one-stop shop of readily searchable content, but it does not provide services itself beyond a series of guides.<sup>6</sup> A second approach is to be more 'encyclopaedic'. ACAS and Citizens Advice both have natural language search facilities that direct to their own information content, which is comprehensive but not personalised.<sup>7</sup>

An online service for low-paid self-employed workers should begin by providing personalised information, by combining these signposting and encyclopaedic approaches. But providing effective access to tailored information will not in itself be sufficient to bridge the self-employment justice gap. Although such a service would clearly help people to take more control over their legal affairs, by making knowledge more accessible, it would not offer resolution.

Fast, low-cost and effective forms of redress are also required. To achieve this, restitution mechanisms should be streamlined and expanded by developing a comprehensive system of online dispute resolution (ODR). Versions of this model have been successful in other countries and should be developed here.

Chapter 2 considers the key employment issues such an ODR service for the self-employed would need to address. Chapter 3 examines the design requirements for an ODR system for the self-employed.

## CHAPTER 2: KEY ISSUES FACING SELF-EMPLOYED WORKERS

The experts we interviewed were unanimous in supporting the principle of using online dispute resolution (ODR) for settling employment disputes that currently go through the courts and tribunals. However, they did not agree on the nature of the system required and the extent of its remit. All offered at least qualified praise for experiments in other countries – especially the Netherlands and British Columbia, Canada – but there were differences of opinion about how applicable they could be to the British context.

One interviewee, for example, thought that ODR would be best used as an initial triaging system before moving claimants towards more traditional alternative dispute resolution mechanisms. The majority of experts we spoke to, however, said that an ODR system should be self-contained and complete, albeit with some ‘permeability’, to transfer cases into traditional court structures where this was appropriate.

Our starting point is that an ODR service should be able to handle many employment disputes from start to finish. However, it is right to acknowledge that disputes experienced by self-employed workers are diverse in nature. They stretch from queries around employment status to issues such as late payments that would ordinarily be classified as money claims. These examples are considered case-by-case to understand the challenges faced by low-paid self-employed workers and the potential efficacy of an ODR solution to them.

### CASE STUDY: BRITISH COLUMBIA

**MyLawBC** was established by the Legal Services Society of British Columbia to bring access to justice online and simplify access for all. It is essentially two separate systems that offer differing functionality. The first, known as Pathways, is an automated tool that asks the user a series of questions to identify their issue before offering an individual action plan as a guidance document on the next steps to resolve the issue. The system provides complete solutions to simple legal matters: for example it can be used to write a legally compliant will.

The second function of MyLawBC is the ‘Dialogue Tool’. This is a bolder initiative that seeks to provide supported negotiation for

separating couples. By asking each party to independently answer questions establishing the facts of the situation and their initial ideas on settlement, the tool then produces a draft separation agreement that can be further tailored by the two individuals working together, with support and resources. It is easy to see how both the Pathways and Dialogue Tool functions could be expanded to cover areas of employment law in the UK.

British Columbia also has an **online-only tribunal service**, the Civil Resolution Tribunal, which exists to facilitate easy settlement of small claims. It operates in three phases – negotiation, conciliation, and adjudication. If parties cannot reach a settlement through bilateral negotiation, they are elevated to facilitated conciliation before ultimately ending up with a tribunal judgement if necessary.<sup>8</sup>

## EMPLOYMENT STATUS QUERIES

In principle, resolving self-employed workers' queries about employment status should be straightforward since this is a matter of fact in law. In practice, however, the boundaries of 'self-employed', 'worker', and 'employee' status can be vague, and especially so in the case of the former two. For workers the issues are even more complicated, because for tax purposes there are only two statuses – self-employed or employed (tax status is considered separately later).

In recent years a number of unions have taken up the issue of employment status and argued that some engagers should be classifying self-employed workers as 'workers' not 'self-employed'. This has produced mixed results, but both the GMB and the Independent Workers of Great Britain have had success in test cases.<sup>9</sup> This shows how unions can use group litigation to improve conditions for low-paid self-employed workers, alongside traditional models of collective organising and individual advice and representation. It also suggests that a fast and effective ODR system would yield practical benefits for misclassified workers.

Employment status matters because there are considerable differences in rights between being 'self-employed' and a 'worker' (see appendix). People with 'worker' status have access to the national minimum wage, holiday pay, sick pay, maternity/paternity pay, and working time regulation

protections, which are not available to the 'self-employed'. For a low-paid contractor the differences of classification in their employment status can make a big difference financially – for example because of minimum hourly pay and paid holidays. In addition, 'worker' status may make their work less precarious.

An ODR system would work best if a statutory definition of self-employment were adopted into UK law, something advocated by unions like Community and by the Association of Independent Professionals and the Self-employed (IPSE). But even without this employment status can be established based on the facts. 'Self-employment' is simply treated as the default when the tests for 'worker' or 'employee' status are not met. A matrix can be developed for assessing an individual's status against key characteristics such as ability to use a substitute, independence of work, use of own materials, and so on. Indeed, IPSE's submission to the Taylor Review offers an excellent basis for developing such a matrix.<sup>10</sup>

A self-employment ODR service could use a comprehensive questionnaire to make a preliminary determination of employment status for the benefit of both worker and engager. Negotiation, conciliation and adjudication stages would then be reserved for disagreements arising from disputed facts or genuine ambiguity.

## TAX STATUS AND IR35

Tax status is binary so should be a straightforward determination. Yet one of our interviewees felt that ODR could have the most positive impacts in this area because of the complexity of engagement arrangements pursued by both contractors and clients.

Much of this complexity hinges on HMRC's off-payroll working rules (known as 'IR35'). These exist to prevent abuse of personal service companies to limit the tax liability of workers and employers, but their implementation has led to some inequitable effects. Contrary to popular belief, there are many low-paid self-employed workers who utilise limited companies as a vehicle for their contracts. This may be out of choice, but often it is effectively compulsory as a result of using certain agencies to procure work or because engagers seek to reduce their own national insurance bill.<sup>11</sup> The practice is relatively common within professional and IT services where there are growing numbers of low-paid workers. IR35 assessments are the responsibility of public sector bodies contracting self-employed workers and this was due to be extended to large private businesses in April 2020.<sup>12</sup> This

has been delayed until April 2021 in light of the coronavirus crisis.

It is right to tax people the same amount for similar work, irrespective of whether they are employed directly or engaged through a company. But many people who are self-employed from the perspective of employment law and have fewer workplace rights believe it is unfair that they should be treated as an employee for tax. The Chancellor has hinted that the taxation of self-employed workers will be reviewed after the coronavirus crisis with a view to levelling up liabilities. This is welcome but should include a review of employment status provisions and the rights and responsibilities of different types of worker to ensure that anyone asked to pay more also receives adequate workplace protection.

HMRC has introduced an online tool 'check employment status for tax' (CEST).<sup>13</sup> However at this stage, this tool is not providing clear guidance in many instances. We tested the tool using six examples of engagement terms provided by self-employed workers interviewed for this project, based on their experiences during the past 12 months. Four used a limited company and two worked under sole trader arrangements. Of these six scenarios, the HMRC tool produced four 'unable to determine status' results, including both the sole trader examples that should, in theory, have been more straightforward. Of the two positive results, one stated that the contract should be taxed as employment and the other that it should not.

The accuracy of the tool's determinations has also been questioned, in the context of a series of recent IR35 test cases. In 2019 the chief executive of Contractor Calculator, a news and advice website, told the Financial Times that CEST was too narrowly focused and did not take the bigger picture of a person's employment relationship into account. HMRC countered that: "CEST is accurate and HMRC stands by its results. CEST has been thoroughly tested and gives the right answer if you put in the right facts."<sup>14</sup>

The apparent limitations of HMRC's tool suggests that an ODR system employing AI-led triaging of cases and the opportunity for swift negotiation, conciliation and adjudication would be of considerable benefit to the low-paid self-employed.

## LATE PAYMENTS

The final area identified by all our interviewees as of prime importance for an ODR is that of late or missing payments for services rendered. This is an enormous problem for the low-paid self-employed and it puts in sharp



focus the extent to which they are reliant on the continued good will of their clients. It is a common fear among contractors that, if they push too hard for a payment they will frustrate their client and fail to secure work in future. The use of invoice factoring services are often forgone for the same reason since this could be interpreted as 'aggressive', according to our interviewees.

Our self-employed interviewees said they are happier chasing larger clients more forcefully than they are smaller ones. This is principally because a large business is more likely to have a finance or procurement function separate from direct contact with the department that engaged their services, thus insulating them from any 'bad will'. At present, however, the self-employed have relatively few options to escalate late payments, and only a minority can access support on late payments from trade unions or similar organisations.

There is a case for strengthening the law to improve late payment protections for self-employed workers and small businesses, as proposed in a House of Lords private member's bill that is currently before parliament<sup>15</sup> The office of the Small Business Commissioner has very limited powers and its formal 'enforcement' power is essentially limited to naming and shaming late payers.<sup>16</sup> Although the Commissioner has had greater success recently, encouraging £3.5m of payments in 2018/19, pursuit of claims via the courts is generally the only legally binding option available to self-employed workers.<sup>17</sup> Since this is a confrontational option, the opportunity to develop ODR-based conciliation, or even an earlier stage of negotiation, is considerable.

### CASE STUDY: NEW YORK

**Cybersettle** is probably the oldest ODR system, having launched in 2000. The State of New York employed the system as a way of clearing its massive backlog of 40,000 insurance settlement claims and the system has proven remarkably successful.<sup>18</sup>

It is a simple, double-blind negotiating tool that allows claimant and insurer to propose figures and closes the case if they can agree. Each party loads up to three rounds of offers, with users retaining control over the negotiating limits. Cybersettle privately compares each round of offers with neither party seeing the opposing offers. When the opposing offers in the same round match or overlap, the system

reaches an instant binding settlement. The parties then contact each other directly to process the settlement terms.

Cybersettle is no longer in operation in its original form but the technology is marketed for sale as a 'white label' ODR application for use by third parties. Its success and longevity demonstrate that such systems can be effective, efficient and generate significant cost-savings for public authorities and users.

Within any ODR process, most late payment disputes would hopefully be resolved quickly upon action being initiated (for example, a complaint is immediately accepted) or following negotiation or conciliation, given the time, expense and possible reputational risk of proceeding to adjudication. The Small Business Commissioner's team could be utilised in the ODR conciliation function.

An ODR service should benefit engagers too, especially as late payments may be the result of a dispute around whether contracted work has been completed to the requisite standard. Conciliation offers an opportunity to resolve this without a having to contest a money claim through court action.

Another advantage of an approach based on an official process involving dialogue between parties is that it is likely to improve the prospects for payment following a decision. At present the online process for making a small claim is fairly straightforward, but a sizeable proportion of small claims awards are not paid in full.<sup>19</sup>

## **OTHER EMPLOYMENT LAW ISSUES**

Beyond the three examples above, an ODR service for self-employed workers could also play a role in settling disputes around other areas of employment law for self-employed workers. For those in the 'self-employed' category, these are likely to relate to health and safety legislation or equalities and anti-discrimination law since these are among the few formal protections they have. For those with 'worker' status there is the possibility of disputes relating to minimum wage payments, holiday and sick pay entitlements, and so on (see appendix).

Many of these employment rights disputes relate to employees not just

'workers' and are covered by the current system of ACAS mediation and employment tribunal claims. In the future, online negotiation, mediation and adjudication could be very valuable in resolving such employee complaints, alongside those of the self-employed. Our proposed ODR service for self-employed workers could be used to test ODR approaches that might one day also be applied to disputes between employees and employers (not just contractors or workers). However, introducing an ODR service for all employment disputes would be a very much larger undertaking and should follow a comprehensive review of access to justice arrangements in the sphere of employment (which we do not consider in this report).

## THE INFORMAL JUSTICE GAP

Although this report focuses on the role of ODR in formal dispute resolution, we saw in chapter 1 that self-employed workers can also experience disadvantages relative to employees because they cannot access institutional machinery to prevent or informally resolve workplace disputes.

Technology could play a role in addressing this issue, for example by providing accurate information or informally resolving disputes, but our expert interviewees did not think it appropriate to combine this function with a formal ODR-based court and mediation service. We are inclined to agree, but previous evidence gathering for our report *Getting Organised: Low-paid Self-employment and Trade Unions*, and discussion with our self-employed interviewees for this project, suggests that the burgeoning field of 'WorkerTech' is worth exploring in relation to the informal resolution of workplace disputes.

Self-employed workers lack informal peer-to-peer support which workers can draw on when facing issues in the workplace. The Work Foundation has found that peer support has many positive outcomes, especially for those with health conditions and disabilities.<sup>20</sup> Much workplace advice and support is informal, and colleagues seek advice from and share information with one another on how to tackle particular situations. Self-employed contractors can be easily excluded from these networks of advice and support, especially if they tend to work on short engagements with multiple clients. Isolation is often cited as one of the more challenging elements of self-employment and is known to have an adverse effect on mental health.

WorkerTech is a possible solution to help build networks among the self-employed. The term covers a range of applications, but they are fundamentally based around connecting workers together to provide mutual

support. A fuller discussion of WorkerTech can be found in the Getting Organised report.

Serious workplace disputes often take the form of grievances by individuals or disciplinary action by employers. These processes derive from employment contracts and self-employed workers do not have access to the same contract-based rights, obligations and procedures, even though they may be working directly alongside employees. Workplace disputes involving contractors or workers may be just as damaging for those involved and may harm their future opportunities to work (eg the receipt of a good reference or future engagements with the same client).

Where it is not possible to rely on HR policies and procedures, a 'digital grievance' (ie a system of informal online mediation and dialogue) might be one way of addressing problems. This could use the same technology as a formal ODR system. The MyLawBC dialogue tool offers an example that could be easily adopted to this different purpose. An informal but structured and facilitated approach could be in the interests of both contractors and engagers to protect their reputations and seek amicable agreement. Since alleged discrimination is a particularly serious issue – and quite probably one of the grievances that is likely to be of ongoing concern to a self-employed worker even after they have left their client – it is especially important to ensure that there are suitable opportunities to address and remedy this at a very early stage.

## CHAPTER 3: DESIGN REQUIREMENTS

As chapter 2 demonstrates, the challenges facing the low-paid self-employed are diverse and complex. An ODR system could deliver a transformative service and address the low-paid self-employment justice gap.

Using technology to extend the reach and efficacy of alternative dispute resolution processes like negotiation, mediation and conciliation should not be controversial. These processes are promoted by ACAS and form a prerequisite for using the employment tribunal. By bringing these together in a digital platform, with adjudication when required, an ODR system could be developed to address the deficiencies of the current options for the self-employed.

We propose that a standalone ODR service should be created specifically to cater for the needs of self-employed workers to close the justice gaps identified in this report. HM Courts and Tribunal Service, ACAS, HMRC and the Small Business Commissioner should be jointly tasked with developing a platform.

The lessons learned from this initiative should also be used to then gradually develop ODR services for a broader range of workplace disputes over time, under the auspices of ACAS and the employment tribunal.

### CASE STUDY: THE NETHERLANDS

Before its closure in 2017, **Rechtwijzer** – a Dutch initiative roughly translated as ‘Signpost to Justice’ – was the most radical and comprehensive online justice platform in the world. It far exceeded its information function and offered an ODR system for settling divorces. The system was more developed than the MyLawBC Dialogue Tool and integrated mediation and adjudication where necessary. Its aim, essentially, was to demonstrate that ODR is an acceptable and appropriate solution to promoting access to justice for parties that may otherwise experience a justice gap.

Rechtwijzer 1.0 allowed law firms or other legal service providers to embed the programme into their own website and provide the service as a supplement to their own. Rechtwijzer 2.0 incorporated online

mediation and arbitration into the package, for a price designed to make it financially self-sustaining but not profit-making. Unfortunately, the Dutch Legal Aid Board, having funded development, withdrew its financial support shortly after the launch of Rechtwijzer's second incarnation.

The platform was successful in demonstrating proof-of-concept, but it failed to secure sufficient business to keep itself afloat without considerable subsidy, which was not forthcoming<sup>21</sup> Only around 1 per cent of those eligible to use the system chose to do so.<sup>22</sup> One of the key issues the platform faced was that it operated as an alternative to formal court process rather than an adjunct to them. The Hiil Group, the organisation behind Rechtwijzer, advocates for the integration of ODR and existing court processes.<sup>23</sup>

An ODR service may seem to be a radical departure for the British legal system, but it deserves serious consideration. As well as Rechtwijzer and MyLawBC, there are also proven examples of the utility of ODR for businesses. The system used by eBay, for example, processes more than 60 million claims each year and does so via a partially automated system. Negotiation between buyer and seller is the first stage and, if this is unsuccessful, the case is escalated to the resolution centre team. This means that only tens of thousands of human interventions are required every year even though tens of millions of claims are processed. The system is a low-value, high-volume process and limited to the direct purchase cost with no recourse to seeking further damages (ie if a faulty item causes injury to the user, there is no ability to claim for this via the ODR process).<sup>24</sup>

Variants of the ODR model have been called for several times in recent years. In 2015, the Civil Justice Council argued for the creation of Her Majesty's Online Court as a way of speeding up the processing and adjudication of low-value civil claims of up to £25,000. The court itself would be supplemented by the use of conciliation and negotiation, including at least some automated processes to reduce time taken and the cost of the system.<sup>25</sup>

Similarly, Lord Justice Briggs' Civil Court Structure Review in 2016 also advocated an online court system for the UK.<sup>26</sup> This is a bolder initiative that the Civil Justice Council scheme, building upon Rechtwijzer, and

would cover a much broader range of activity while also integrating with the physical courts. Lord Justice Briggs' proposals focus in particular on the need to improve access to justice for those who experience difficulty in accessing legal aid and do not have the expertise to navigate the currently complex system. Taken together, these proposals provide a sound basis for a successful ODR system

## STAGES IN THE ODR PROCESS

The proposed ODR service for self-employed workers should be able to deliver the six stages of dispute resolution presented in figure 1, overleaf. The benefit of aligning all stages within a single ODR system is that each stage can build on the evidence and conduct of the preceding one in a quick, efficient and straightforward manner.

To succeed, a system for self-employed workers must be readily usable without the support of a lawyer or other professional adviser. This is the only way both to ensure that accessibility is not constrained and to reduce costs. The self-employed workers we interviewed were very clear that this would be fundamental to their decision as to whether they would use such a service. It is worth noting that the employment tribunal was intended to be informal when it was established, with litigants easily able to represent themselves. These days personal representation is widely viewed as an obstacle to fair and effective justice in the tribunal. The employment tribunal system is convoluted and requires approximately 30 weeks to complete.<sup>27</sup>

A successful ODR system is likely to require the use of artificial intelligence tools to ensure a speedy process, at least at the initial stages. AI is potentially one of the most disruptive innovations for legal services (as the Law Society has noted) and it presents a significant opportunity to reduce costs and widen access to justice.<sup>28</sup> In the US, AI can already be seen in operation in services like DoNotPay, a mobile phone application. This system asks questions to establish the user's circumstances and then draws up documents that can be used to commence a lawsuit. It was developed to challenge parking tickets but has evolved to tackle a wide range of issues, especially around consumer protection law. At its core, DoNotPay addresses the fact that legal rights are of no use unless the infringed party both knows their rights and how to enforce them.

A service like ACAS's current Online Helpline could be readily supplemented by the use of artificial intelligence tools to better understand the questions asked and the answers that are needed. Advances in AI are

**FIG 1: DESIGN REQUIREMENTS FOR AN ONLINE DISPUTE RESOLUTION SERVICE FOR THE SELF-EMPLOYED**





making 'chatbot' functions more intuitive, sophisticated and accurate, but they should still be supplemented by live chat functions connecting website users with trained advisers. The detail of both 'bot' and 'human' chat conversations can, in turn, be used to improve the database over time.

Negotiation and conciliation services can also be delivered through an online tech-enabled solution. These have proven to be one of the more popular elements of the technology that underpinned the Rechtwijzer project in the Netherlands and has been implemented by MyLawBC in the form of a dialogue tool for separating couples.<sup>29</sup> Similar approaches have also been applied in the case of eBay and Cybersettle.

Since there is a fundamental power imbalance between contractors and clients an ODR system will not be effective as a voluntary service. This is especially true when we consider the low-paid self-employed, who are likely to be dependent upon a small number of clients. It will therefore be necessary to mandate engagement by putting the service on a statutory footing. This is the key lesson from the lesson from the Netherlands' Rechtwijzer experiment.

These proposals have expenditure implications, although spending on the ODR service would help save parties far more in legal costs. It would be possible to cover the capital set-up costs from a small allocation from the £1bn fund that the government has made available for technological innovation in the justice system.<sup>30</sup> A significant investment in establishing an ODR for self-employment is also easier to justify when thinking of it as a testbed for wider developments for all of employment law. The annual spending required to maintain an ODR service could be provided by a combination of public budgets and fees for the later, more involved stages of the ODR process.

## APPENDIX

### SUMMARY OF DIFFERENCES BETWEEN SELF-EMPLOYED, WORKER AND EMPLOYEE LEGAL STATUS<sup>31</sup>

	Definition	Rights
<b>Self-employed</b>	<ul style="list-style-type: none"> <li>• They run their business for themselves and take responsibility for its success or failure</li> <li>• They are not paid through PAYE (ie self-employed under tax law)</li> </ul> <p>Most of the following apply:</p> <ul style="list-style-type: none"> <li>• They can make a loss as well as a profit</li> <li>• They decide what work to do, when, where and how</li> <li>• They can hire someone else to do the work</li> <li>• They charge a fixed price for the work however long it takes; unsatisfactory work must be put right in their own time</li> <li>• They use their own money to buy tools and equipment</li> <li>• They can work for more than one client</li> </ul>	<ul style="list-style-type: none"> <li>• Health and safety protections</li> <li>• Protection against discrimination</li> <li>• Contractual rights in agreements</li> </ul>
<b>Workers</b>	<ul style="list-style-type: none"> <li>• They are paid to personally carry out work (with limited or no ability to send a substitute)</li> <li>• They are expected to work even if they don't want to</li> <li>• Their employer has to provide them work</li> <li>• They are not operating as a limited company selling goods or services</li> </ul>	<p>The above plus:</p> <ul style="list-style-type: none"> <li>• National minimum wage/living wage</li> <li>• Statutory working time and holiday rules</li> <li>• Protection against discrimination &amp; unfair treatment of part-time workers</li> <li>• Protection for whistleblowing</li> <li>• Access to a workplace pension including employer pension contribution</li> <li>• They may be entitled to statutory pay for sickness, maternity, paternity, adoption, shared parental leave</li> </ul>

Continued...

	Definition	Rights
<b>Employees</b>	<ul style="list-style-type: none"> <li>• There is a (written or oral) contract of employment.</li> </ul> <p><b>Most of the following apply:</b></p> <ul style="list-style-type: none"> <li>• They are required to work regularly, for agreed minimum hours and expect to be paid for the time worked</li> <li>• A manager or supervisor is responsible for their work</li> <li>• They can't send someone else to do their work</li> <li>• The business deducts tax and national insurance contributions from their wages</li> <li>• They get paid holiday</li> <li>• They're entitled to contractual or statutory pay for sickness, maternity, paternity, adoption and shared parental leave</li> <li>• The employer's disciplinary and grievance procedures apply to them</li> <li>• They work at an address specified by the business</li> <li>• Their contract sets out redundancy procedures</li> </ul>	<p><b>The above plus:</b></p> <ul style="list-style-type: none"> <li>• Statutory leave for sickness, maternity, paternity, adoption &amp; shared parental leave</li> <li>• Protection from unfair dismissal</li> <li>• Right to request flexible working</li> <li>• Time off in emergencies</li> <li>• Statutory redundancy pay</li> </ul>

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